ly therefor with such necessary modifications as may be necessary to suit the general practice of this Court. (In this case no modification appears to be necessary since the procedure of the English Courts is broadly possible here). It is not necessary for me to rule on the meaning of the words "not being between a plaintiff and defendant" in section 472, Civil Procedure Code.

In coming to this conclusion I am fortified by the practice of the Courts in the former Federated Malay States. Up to 1937 proceedings to appoint guardians appear to have been commenced by plaint. After the enactment of the F.M.S. Civil Law Enactment in 1937 the practice was normally to commence proceedings even in disputed cases by way of originating summons. The question of the correct procedure was considered by the Courts in *V. Solai v. Mariayee*[2] in which Bellamy, J., who did not have the benefit of argument by counsel, ruled that no suit will lie for the custody of an infant and that the proper procedure, where there is no action or other proceeding pending, is for an application to be made by originating summons in the matter of the infant. This case was referred to in argument before Wilson, J. in C.S. 675/53 when application was made by the defendant to strike out a suit for custody. Wilson, J., without giving reasons, dismissed the application: he did not record his reasons and was not asked for them. Nevertheless he did not strike out the suit. It would seem that Wilson J. considered that a suit could be entertained.

With respect to the opinion of Bellamy, J. I am not prepared to go with him so far as to say as he does that, "It (the English O.55a) does not appear to admit of any such proceeding (i.e. for the custody of a child) being taken by a suit". I agree with Mr. Ramani that the provisions of O.55a, r.2(b) are permissive and not exclusive. I consider that even in England the proceedings could be begun by action though a successful plaintiff might well find that he did not get all his costs.

From the cases cited to me by Mr. B. K. Das for the plaintiff it appears that the English (and Canadian) practice is usually to begin by originating summons even in complicated cases and that the procedure is as set out in *Odgers* on Pleading and Practice *op cit* page 349.

The question now arises whether on the facts of this case as they now appear there is any justification for holding that this case ought to be decided by way of action. On this case as it now stands I cannot see that the issues are likely to be any more difficult than they were in some of the English cases. It may be that before the end of the case it will be apparent that this case could have been more expeditiously disposed of by way of suit in which case the Court may be able to give practical expression to its opinion through the medium of costs. It is possible that at any stage of these proceedings it is open to the Court if the proceedings became unmanageable to adjourn this originating summons until an action has been brought and decided. That is a matter which can be better considered and discussed if and when the plaintiff's affidavits have been replied to.

Speaking for myself I have so far experienced no difficulty in dealing even with disputed cases in the manner described by *Odgers* though admittedly no cases of considerable complexity have been before me.

While agreeing with Mr. Ramani that the procedure for originating summonses does not provide for such useful procedures as pleadings and discovery nevertheless, as Mr. Das said, the Court has an inherent jurisdiction to give any necessary directions. The important matter is that justice be done speedily: I cannot at this stage in a proceeding which has so far followed the normal practice of the Courts see that a just decision will be more speedily reached by quashing the present proceedings and obliging the plaintiff to start all over again.

The application is dismissed.

I will now hear any argument with regard to costs and orders consequential upon my ruling.

Application dismissed.

Solicitors: *Das & Co.; Braddell & Ramani.*

CHOO TIONG HIN & ORS. v. CHOO HOCK SWEE

[C.A. (Whyatt C.J., Wee Chong Jin and Chua JJ.) July 11, 1958]

[Singapore — Civil Appeal No. 30 of 1957]

Family arrangement — Mutual agreement between father and adoptive children to work family farm and business enterprises — Whether enforceable — Contract.

Practice — Court of Appeal — Finding of fact by trial Judge.

The plaintiff (respondent) and his first wife, then poor, went to live in a house and farm in Singapore in about 1916. In the course of time, two daughters were born and five sons adopted, and most of the family (including all the adopted sons and numerous grand

children) lived together on the premises. All those old enough to do so worked on the farm, which was enlarged, and in various other business enterprises which the expanding prosperity of the family made possible. In 1955, as a result of family quarrels which ensued after the respondent's remarriage following the death in 1953 of his first wife, the respondent left the family home. He then brought actions against three of his adopted sons and two of his grandsons, claiming possession of the farm and family house and damages for trespass, a declaration that he was the beneficial owner of a petrol filling station erected by him on land adjacent to the farm, and the return of two lorries used on the farm. The defendants (appellants) alleged, *inter alia*, that there were contracts between the respondent and the adopted sons whereby the latter agreed to be adopted and to work with the respondent for the acquisition of wealth to be administered by him, and that, having been adopted and having held to acquire wealth, they were entitled equally with the respondent to possession of the farm and the other property and to equal shares in it when the respondent died.

Held, affirming the decision of Tan Ah Tah J.: (1) the agreements alleged by the appellants, even if proved, were not intended to create legal relations, and were therefore not binding in law as contracts;

(2) a clear distinction is to be drawn between findings of fact which depend upon the credibility of witnesses and findings of fact which depend upon inferences from other facts, and it is a heavy task to persuade the Court of Appeal to disturb the trial Judge's findings of the former variety, especially in cases where the demeanour of witnesses is important, as in a deep and bitter family dispute.

Cases referred to:—

(1) *Balfour v. Balfour* (1919) 2 K.B. 571.
(2) *Simpkins v. Pays* (1955) 3 All E.R. 10.
(3) *Hoddinott v. Hoddinott* (1955) 3 All E.R. 10.
(4) *Benmax v. Austin Motor Co. Ltd.* (1955) 1 All E.R. 327.

COURT OF APPEAL. Appeal from the decision of Tan Ah Tah J.

L. A. J. Smith for the appellants.

C. H. Withers-Payne for the respondent.

Cur. Adv. Vult.

Whyatt C.J. (after stating the facts as summarised in the headnote, continued): Leaving aside, therefore, the technical question whether the agreement set out in paragraphs 14 and 16 of the defence is sufficiently and properly pleaded, the question remains whether an agreement of this character is one which creates legal relations which the parties have a right to enforce in the Courts. It is, of course, elementary that an agreement is not a contract in the strict sense of the word, unless it is the common intention of the parties that it shall be legally enforceable. Such an intention is normally inferred from the nature of the agreement. For instance, in the case of agreements regulating commerce or business, it is obvious that the parties intend legal consequences to follow; *per contra*, in the case of agreements relating to social engagements, it is inferred as a matter of course that there is no common intention to create legal obligations. Between these two extremes, there are agreements where it cannot be so readily determined whether they create legal obligations or not. If an agreement is made between members of a family in the course of family life, as was the case in *Balfour v. Balfour*,[1] the law will ordinarily imply, from the circumstances of the case, that the parties did not intend their agreement to have legal consequences. On the other hand, in *Simpkins v. Pays*,[2] an agreement between a lodger and a landlady, living in circumstances which had some element of a family circle, to share the winnings in a newspaper competition was held to be an enforceable contract. A similar case but with a different result was *Hoddinott v. Hoddinott*[3] where the Court of Appeal held that a wife who had assisted her husband in making a correct forecast in a football pool was not entitled to share the winnings.

The question in every case is whether the law will imply, from the circumstances of the case, a common intention that the agreement is to be attended with legal consequences. The chief circumstances to be considered in the present case are the adoption and the events which are said to have accompanied the adoption, of these five sons by the respondent. No particular Chinese custom affecting adoption was pleaded or proved and the argument on this point, therefore, is limited to the matters set out in paragraphs 14 and 16 of the defence where it is alleged first, that two of the appellants, upon their adoption, agreed to marry wives chosen for them by their adoptive father and to work on the farm to produce wealth to be administered by the adoptive father for the benefit of all and secondly, that upon the adoption of the fifth and last son, all agreed that the five adopted sons and their adoptive father should work together to acquire wealth, to be administered by the father during his lifetime for the benefit of the family and that after his death the wealth should go to the adopted sons in equal shares. The agreements, thus pleaded, possess all the characteristics of a private family arrangement depending for its efficacy upon a sense of filial duty and paternal responsibility on the part

of the adopted sons and their adoptive father. As one of the adopted sons, Choo Lam Heng said, with disarming ingenuousness, whilst giving evidence in chief: "He (the plaintiff) was head of the family... We trusted him to use the money in the way I have described. There was a spirit of trust among us before the plaintiff's wife came. I was present at all solemn gatherings where important family affairs were discussed and decided upon. The fulfilment and implementation of the decisions made depended upon mutual confidence." This is not the language of a person intending that the agreement between himself and his adoptive father should be attended with legal consequences. If, for example, a dispute had arisen under the agreement as to the choice of a bride for an adopted son, can it be suggested that the parties intended that the jurisdiction of the Courts should be invoked to settle it? Or, if there should be disagreement as to whether an adopted son is working as he ought to do in order to produce wealth for the family, can an issue, so vague and unprecise in its terms, be resolved by litigation in the Courts? Agreements of this character between adopted sons and their adoptive father may well work satisfactorily so long as a spirit of trust and mutual confidence prevail within the family but if this ceases to exist, then in my opinion, the sanctions of the Courts are no substitute. As Atkin L.J. (as he then was) said, referring to a family arrangement in *Balfour v. Balfour*[1] (at 579):

> "Agreements such as these are outside the realm of contracts altogether... The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law...are such as find no place in the domestic code... In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted."

It is true that in that case Lord Atkin was referring to an agreement between a husband and wife but in my judgment these *dicta* apply with equal force to a family arrangement between a father and his adopted sons of the kind pleaded in this case. It follows, in my view, that the law will not, in this case, imply an intention that the agreement between the adopted sons and the respondent should be attended by legal consequences and therefore the pleas set out in paragraphs 14 and 16 of the amended defence do not constitute a defence in law to the respondent's claim to possession of the farm and of the two motor lorries in these consolidated proceedings.

It is unnecessary for me, having reached this conclusion, to consider whether the evidence led before the trial Judge proved the averments in paragraphs 14 and 16 of the amended defence but in view of the arguments addressed to the Court on this aspect of the appeal, I will state my views briefly. The appellants called the five adopted sons, two grandsons and a natural daughter of the respondent in an attempt to rebut the testimony of the respondent that he never at any time agreed that the farm, the family house, the lorries and other property which he purchased from time to time should be held for the benefit of the family as a whole. In this attempt they completely failed according to the judgment of the trial Judge who expressed himself thus:

> "Wherever there is a conflict between the evidence of the plaintiff and that of the defendants I accept the version given by the plaintiff as being truthful and I reject that given by the defendants."

Counsel for the appellants endeavoured to deal with this finding of the trial Judge which from the point of view of the appellants was an extremely awkward one, by contending that the learned trial Judge had failed to distinguish between the perception and evaluation of facts, using those words in the sense attributed to them by Viscount Simonds in *Benmax v. Austin Motor Co. Ltd.*,[4] and that the learned Judge's finding, expressed in such general terms, was of no more assistance to the Court of Appeal than would be a finding of negligence by a trial Judge unaccompanied by any findings as to the specific facts from which the negligence had been inferred. In my opinion this argument misapprehends or at least misapplies the principles enunciated by Viscount Simonds in *Benmax v. Austin Motor Co. Ltd., supra.* It is clear from the noble Lord's speech in that case that a clear distinction is to be drawn between findings of fact which depend upon the credibility of witnesses and findings of fact which depend upon inferences from other facts. The learned trial Judge in the passage I have just quoted was dealing solely with the credibility of witnesses, albeit in a compendious form, and there is no ground for suggesting that he was fusing, still less confusing, findings based upon credibility with findings based upon inference which was the process deprecated by Viscount Simonds in *Benmax's case.* The particular applications of this general finding of the learned trial Judge as to the credibility of the witnesses appear in subsequent passages of his judgment and the

appellants are faced in this appeal with the task of persuading this Court to reach different findings of fact, notwithstanding that those findings are based upon the credibility of witnesses who gave evidence in the Court below. This would be a heavy task in any circumstances but it is doubly so in a case such as this, involving a deep and bitter family dispute, where the imponderable elements, or as Lord Goddard has called it, the atmosphere of the case, is so important and can only be fully appreciated by the Judge who presided over the trial and had the opportunity of seeing and hearing the witnesses and observing their bearing when they gave evidence. Before leaving this part of the case, therefore, I think it desirable to record that if it were necessary for me to make findings of fact for the purposes of this judgment, I would concur in those which the learned trial Judge made in the Court below.

[His Lordship then dealt with an allegation that the petrol filling station had been given by the respondent to the two grandsons and found that there had in fact been no such gift.]

Wee Chong Jin and **Ambrose JJ.** concurred.

Appeal dismissed.

Solicitors: *Marshall & Co.; Drew & Napier.*

MUTHUKARUPPAN v. THE TOWN COUNCIL, TAIPING

[A.Cr.J. (Good J.) June 10, 1958]

[Ipoh — Criminal Revision No. 8 of 1958]

Local Authority — Nuisance order — "Hearing the complaint" under s.80(i)(a) of the Town Boards Enactment (F.M.S. Cap. 137) — Procedure.

Where a person is summoned to appear before a Magistrate under section 80 of the Town Boards Enactment and the Magistrate purports to act under section 80(i)(a), "hearing the complaint" does not mean merely reading what the Chairman has stated in his complaint; it must mean hearing the evidence of the matter complained of and giving the person against whom the complaint is made an opportunity of adducing evidence in rebuttal. In other words, the Magistrate should hear both sides of the case in accordance with the ordinary procedure of the Courts.

In this case there was no evidence on the record to show that a notice to abate a nuisance had been served upon the applicant and that he had made default in complying with it, and therefore the provisions of section 80 had not been complied with.

Held: (1) this omission, going as it did not merely to a matter of procedure but to the fundamental question whether justice had been seen to be done, amounted to an illegality and not merely an irregularity curable under section 422 of the Criminal Procedure Code (F.M.S. Cap. 6);

(2) the nuisance order should be set aside and the case should be remitted for re-hearing the complaint in accordance with normal judicial procedure.

CRIMINAL REVISION.

P. P. Dharmananda for the applicant.

F. C. Cooke (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Good J.: This is an application made to me on the 3rd April, 1958, for the revision of an order made by the Magistrate, Taiping, on the 6th July, 1957, requiring the applicant —

"1. To cease keeping cattle on lot No. 1946, Kampong Boyan, Taiping;

2. To demolish the cattle shed belonging to you on the abovenamed lot;

3. To keep the said lot in a clean and sanitary condition after demolition of cattle shed."

The applicant had a right of appeal under section 88 of the Town Boards Enactment which he did not choose to exercise, and I would be most reluctant to use my revisionary powers in such a case unless I was satisfied that there had been a miscarriage of justice. The principle "*fiat justitia*" however includes the principle that justice must not only be done but must manifestly and undoubtedly be seen to be done, and I am not satisfied that this can be said of the present case.

The applicant was summoned to appear before the Magistrate by a summons in Form G in the Schedule to the Town Boards Enactment issued under section 80, and the Magistrate purported to act under section 80(i)(a). In order that the Magistrate should be invested with the jurisdiction to make a nuisance order under that sub-section four conditions would have to be fulfilled —

(i) a notice must have been served on the person concerned to abate a nuisance;

(ii) he must have made default in complying with one or more of the requisitions of the notice within the time specified therein;

(iii) there must have been a complaint by the Chairman; and

(iv) the Magistrate must have heard the complaint.

What happened in fact was that a complaint was made by the Chairman but the Magistrate took no evidence at all and, in effect, he made an *ex parte* order. "Hearing the complaint" cannot mean merely reading what the Chairman has stated in his complaint; it must mean hearing evidence of the matters complained of and giving the person against whom the complaint